78-1466

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

PLY*GEM INDUSTRIES, INC., *et al.*,

Petitioners,

v.

JOHN M. LEE, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Ply*Gem Industries, Inc. ("PGI"), Ply*-Gem Home Centers, Inc. ("PGH") and Ply*Gem of Laurel, Inc. ("PGL") respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed an order of the United States District Court for the District of Columbia, denying petitioners' motion to dismiss the complaint for lack of personal jurisdiction under Section 12 of the Clayton Act (15 U.S.C. §22). All of the petitioners were served with process outside of the District of Columbia, allegedly pursuant to that statute.

Section 12 confers jurisdiction in an antitrust case by way of extra-territorial service of process upon a corporation, only when the action is brought in a judicial district ". . . wherein it *is* an inhabitant . . .", *or* "wherein it may *be* found or *transacts* business;" (emphasis supplied). It was uncontested that none of the petitioners was an inhabitant of, or was found, or transacted business in the District of Columbia at the time this action was commenced. For this reason, petitioners argued that the District Court lacked personal jurisdiction over them and, therefore, that the complaint should be dismissed. Both the District Court and the Court of Appeals rejected that argument and applied a far more liberal concept of expanded jurisdiction under the Clayton Act, holding that Section 12 should be construed as conferring personal jurisdiction over all corporate defendants who *transacted* business in the District during the time when the plaintiffs' claims arose, rather than at the time of commencement of suit.

There is a clear conflict among the Circuits over the proper interpretation of Section 12 of the Clayton Act. Petitioners pray that a Writ of Certiorari issue from this Court to resolve this important question of federal jurisdiction and venue.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in Appendix A.* The memorandum opinion of the District Court was not reported and is set forth in Appendix B.

* References to the appendices herein are prefaced with the appendix letter followed by the page number; references to the appendix on appeal to the District of Columbia Circuit are preceded by the letters "DA," followed by the page number.

Jurisdiction of this Court

The judgment sought to be reviewed was entered on January 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Question Presented

Whether a District Court may exercise personal jurisdiction over a corporate defendant by means of extra-territorial service of process under Section 12 of the Clayton Act, when it is undisputed that said defendant is not an inhabitant of, is not found in and does not transact business in that District when the action is commenced.

Statement of the Case

The Parties

Petitioner PGI is a corporation organized under the laws of the State of New York. Its only place of business is in New York City. PGI is not an operating company (DA165).

PGI at one time owned all of the stock of petitioner PGH, which was formerly known as The Paneling Studio, Inc. ("PSI"). PGH was organized under the laws of New York. Its principal place of business was in New York. PGH performed management services for various other corporations, including the third petitioner, PGL. On December 31, 1974, PGH was merged into PGI and ceased to have any independent existence (DA166).

Petitioner PGL was a wholly-owned subsidiary of PGH and, following the merger of PGH into PGI, became a wholly-owned subsidiary of PGI. PGL is a corporation organized under the laws of Maryland. Its principal and only place of business was in Laurel, Maryland, where it operated a distribution warehouse. On July 16, 1967, PGL terminated that operation and ceased doing business when Flintkote Company, an independent distributor of PGI's products, took over this function completely (DA166). Prior to that time, the only business which PGL transacted in the District consisted of occasional sales and shipments of merchandise to one customer in the District (Harbinger's Inc., one of the respondents), amounting *in toto* to $9,625 in 1975 and $3,867.63 in 1976 (DA169).

It was undisputed that PGL's cessation of business was the product of an objective business judgment, made in good faith (DA188). No claim was made by respondents that PGL's cessation of business in the District was motivated by an attempt to avoid jurisdiction (compare *United States* v. *Scophony Corp.*, 333 U.S. 795, 808 (1948)).

History of Action to Date

This action was commenced by respondents on August 10, 1976 (DAi). Process was served outside of the District of Columbia, purportedly in reliance upon 15 U.S.C. §22. The complaint contained five counts and sought money damages only. The first two counts, pleading antitrust violations, provided the sole basis for federal jurisdiction. The third through fifth counts alleged common law claims and jurisdiction thereof was alleged to be pendent to the first two counts.

On October 6, 1976, petitioners filed a motion to dismiss the entire complaint for lack of personal jurisdiction and for other relief, not material to this Petition, upon the grounds that: (1) PGI never transacted any business within the District of Columbia; (2) PGH never transacted business within the District of Columbia and, indeed, ceased to exist on December 31, 1974; (3) PGL ceased transacting business in the District of Columbia prior to the institution of this action; and (4) for two years prior to said cessation of business, PGL's contacts with the District of Columbia were *de minimis* and, therefore, wholly insufficient to permit personal jurisdiction to be exercised over it pursuant to Section 12 (DA169).

On November 29, 1976, the District Court (Gesell, J.) denied petitioners' motion, holding that "it is not essential to venue that business must still be transacted as of the date of filing of the complaint," citing and following *Board of County Commissioners* v. *Wilshire Oil Co. of Texas*, 523 F.2d 125, 131 (10th Cir. 1975) (B1).

The Court of Appeals affirmed the holding that there was personal jurisdiction over PGL, but remanded the issue as to whether there was personal jurisdiction over PGI and PGH to the District Court for determination.

The rationale of the Court of Appeals' decision was that under 15 U.S.C. §22, a corporate defendant is subject to personal jurisdiction in a District, if that defendant was transacting business in the District when the plaintiff's claim arose, not when the action was commenced, as petitioners had argued (A8-16).

Reasons for Granting Certiorari

Section 12 of the Clayton Act (15 U.S.C. §22) is an amalgam of jurisdiction and venue, i.e., if venue is proper, extraterritorial service is allowed. The test of Section 12 is as follows:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

All of the operative verbs of the statute, "is", "may be found", and "transacts", are couched in the present tense.

Based upon the express language of Section 12, the Third Circuit and District Courts in the Second, Sixth and Seventh Circuits have held that, in order for personal jurisdiction to exist, the defendant must be transacting business in the District at the time when the action is commenced (see, *Sunbury Wire Rope Manufacturing Co.* v. *United States Steel Corp.*, 230 F.2d 511, 512-13 (3d Cir. 1956); *Redmond* v. *Atlantic Coast Football League*, 359 F. Supp. 666, 669 (S.D. Ind. 1973); *Hawkins* v. *National Basketball Ass'n*, 288 F. Supp. 614, 615 (W.D. Pa. 1968); *Stern Fish Co., Inc.* v. *Century Seafoods, Inc.*, 254 F. Supp. 151, 154 (E.D. Pa. 1966); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506, 509 (E.D. Pa. 1965); *School District of Philadelphia* v. *Kurtz Bros.*, 240 F. Supp. 361, 364 (E.D. Pa. 1965); *United Industrial Corp.* v. *Nuclear Corp. of America*, 237 F. Supp. 971, 979 (D. Del. 1964); *Commonwealth Edison Co.* v. *Federal Pacific Electric Co.*, 208 F. Supp. 936, 939 (N.D. Ill. 1962); *Gem Corrugated Box Corp.* v. *Mead Corp.*, 189 F. Supp. 584, 586 (S.D.N.Y. 1960); *Schreiber* v. *Loew's, Inc.*, 147 F.Supp. 319, 324 (W.D. Mich. 1957); *Newmark* v. *Abeel*, 102 F. Supp. 993, 994 (S.D.N.Y. 1952).

The rationale behind these decisions was summarized in *Stern Fish Co., Inc.* v. *Century Seafoods, Inc., supra,* as follows:

> "The venue statute speaks in the present tense so that *unless the defendant was transacting business in this district at the time the action was commenced,* venue is improper." 254 F. Supp. at 154 (emphasis added).

The Court in *Gem Corrugated Box Corp.* v. *Mead Corp., supra,* expressed another convincing reason for its ruling:

> "[N]othing in the statute indicates a congressional intent to depart from the usual temporal reference, i.e., the date the complaint is filed with the court." 189 F. Supp. at 586 (citing the *Sunbury* decision, *supra*).

The Court of Appeals for the District of Columbia Circuit, however, chose not to follow this line of cases and instead followed decisions of the Ninth and Tenth Circuits holding that the appropriate point of reference under Section 12, despite the express language of the statute in the present tense, is whether a defendant was transacting business in the District when the plaintiffs' claims arose, not when the action was commenced. *Board of County Comm'rs* v. *Wilshire Oil Co.*, 523 F.2d 125, 131 (10th Cir.

1975); *Eastland Constr. Co.* v. *Keasbey & Mattison Co.*, 358 F.2d 777, 780 (9th Cir. 1966) (A11).

The conflict is clear: is the correct reference point for jurisdiction under Section 12 the time when the plaintiffs' claims arose, or the time when the action was commenced? The Circuits are divided on this issue and the conflict begs for resolution by this Court.

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1008

JOHN M. LEE, *et al.*, APPELLEES

v.

PLY*GEM INDUSTRIES, INC., *et al.*, APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 76-1492)

Argued December 6, 1977

Decided January 11, 1979

Judgment entered
this date

Jay F. Gordon, with whom *George Berger* was on the brief, for appellants. *John F. McCarthy, III*, also entered an appearance for appellants.

Coleman Rosenfield, Attorney, of the Bar of the Supreme Court of Florida, *pro hac vice*, by special leave

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

of Court, with whom *Michael Hausfeld* was on the brief, for appellee.

Before BAZELON, LEVENTHAL and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Appellees are operators of retail stores in the Washington-Baltimore area known as Ply*Gem paneling centers. They instituted this litigation in the District Court for the District of Columbia against the Ply*Gem companies, related concerns engaged in the manufacture and marketing of wood paneling and associated products.[1] One of these companies, Ply*Gem of Laurel, Inc., licensed appellees to operate their paneling centers, which feature Ply*Gem products as their principal line and utilize Ply*Gem trademarks and tradenames in their advertising. The first two counts of the complaint charge the companies with foisting exclusive dealing and tying arrangements upon their franchisees in violation of Section 1 of the Sherman Act[2] and Section 3 of the Clayton Act.[3] The remaining three counts allege fraud, breach of contract and breach of fiduciary duty.[4]

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[1] Ply*Gem Industries, Inc., a New York corporation, is the parent of Ply*Gem Manufacturing Corporation, which is not a party to the case. At one time Ply*Gem Manufacturing Corporation owned all of the stock of Ply*Gem Home Centers, Inc., formerly known as The Paneling Studios, Inc. Ply*Gem Home Centers performed management services for various corporations, including Ply*Gem of Laurel, Inc., its wholly-owned subsidiary and appellees' franchisor. On December 31, 1974, Ply*Gem Home Centers was merged into Ply*Gem Industries, whereupon Ply*Gem of Laurel became a wholly-owned subsidiary of Ply*Gem Industries. Affidavit of Bernard Hewitt, Chairman of the Board of Ply*Gem Industries, at 1-2, Appellants' Appendix (App.) 165-166.

[2] 15 U.S.C. § 1 (1976).

[3] 15 U.S.C. § 14 (1976).

[4] See Complaint ¶¶ 48-65, App. 21-34.

Appellants, the Ply*Gem companies, moved to dismiss the action for lack of personal jurisdiction and for improper venue. The District Court rebuffed these challenges, finding that the companies had transacted business in the District of Columbia at the time of the alleged antitrust violations [5] and deeming that fact sufficient to sustain venue and extraterritorial service of process under Section 12 of the Clayton Act.[6] The companies also requested the court to stay prosecution of the fraud, breach of contract and breach of fiduciary duty counts pending arbitration of those claims pursuant to a provision common to the franchise agreements.[7] The court denied the stay, reasoning that "[a]rbitration will not resolve the basic antitrust claims and the parties have already attempted arbitration without success." [8]

This ensuing appeal tenders several issues for our consideration. We conclude initially that the District Court's order refusing a stay is appealable,[9] and that its denial of the motion to dismiss for want of proper venue and service is also properly before us.[10] We then affirm the court's disposition of the latter motion.[11] We reverse, however, the order refusing to stay proceedings on the common law counts to enable arbitration.[12]

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[5] *Lee* v. *Ply*Gem Indus., Inc.*, No. 76-1492 (D.D.C. Nov. 29, 1976) (unreported), App. 207-208.

[6] 15 U.S.C. § 22 (1976).

[7] See note 61 *infra* and accompanying text.

[8] *Lee* v. *Ply*Gem Indus., Inc.*, *supra* note 5, at 1, App. 207.

[9] Part I(A) *infra*.

[10] Part I(B) *infra*.

[11] Part II *infra*.

[12] Part III *infra*.

I. Appealability

A. *The Stay Order*

The District Court's refusal to stay itself obviously is not a final order for purposes of this appeal.[13] It is well established, however, that an order disposing of a motion for a stay is to be treated as a ruling on a motion for an injunction—and as such, though interlocutory, immediately appealable [14]—provided that two conditions are satisfied.[15] First, the litigation in which the order is entered must be legal rather than equitable in character.[16] Second, the stay must have been sought to enable the prior determination of an equitable defense.[17] This rule, much-

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[13] See 28 U.S.C. § 1291 (1976).

[14] Pursuant to 28 U.S.C. § 1292(a)(1) (1976).

[15] *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180-185, 75 S.Ct. 249, 252-254, 99 L.Ed. 233, 238-240 (1955); *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449, 451-452, 55 S.Ct. 313, 314, 79 L.Ed. 583, 586 (1935); *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, 381-383, 55 S.Ct. 310, 311, 79 L.Ed. 440, 442-443 (1935); *Houssain* v. *Bache & Co., Inc.*, 183 U.S.App.D.C. 339, 562 F.2d 1287 (1977); *Travel Consultants, Inc.* v. *Travel Management Corp.*, 125 U.S.App.D.C. 108, 111, 367 F.2d 334, 337 (1966), *cert. denied*, 386 U.S. 912, 87 S.Ct. 861, 17 L.Ed.2d 785 (1967); *Teamsters Int'l* v. *Stillpass Transit Co.*, 128 U.S.App.D.C. 221, 222 n.1, 386 F.2d 983, 984 n.1 (1967). *Cf. City of Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 257-258, 69 S.Ct. 1067, 1069, 93 L.Ed. 1347, 1349-1350 (1949).

[16] See, *e.g.*, *Houssain* v. *Bache & Co., Inc.*, *supra* note 15; *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F.2d 1197, 1201 (2d Cir. 1970); *Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1086, 1090-1091 (5th Cir. 1973); *cf. United States* v. *Chelsea Towers, Inc.*, 404 F.2d 329, 330 (3d Cir. 1968).

[17] See, *e.g.*, *Hines* v. *D'Artois*, 531 F.2d 726, 729 (5th Cir. 1976); *Chronicle Pub. Co.* v. *National Broadcasting Co.*, 294 F.2d 744, 746 (9th Cir. 1961); *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40, 41 (10th Cir.), *cert. denied*, 389 U.S. 829, 88 S.Ct. 92, 19 L.Ed.2d 87 (1967).

maligned as divorced from any rational or coherent appeals policy,[18] is the result of reasoning by historical analogy to the days when the chancellor would enjoin a court of law from proceeding in an action after an equitable defense thereto had been asserted.[19]

An agreement to arbitrate a legal dispute is considered an equitable defense.[20] Thus the appealability of the order denying the stay here turns wholly upon whether the underlying litigation is legal or equitable in nature. If legal, the ruling is analogous to the chancellor's refusal to enjoin proceedings in a law court; if equitable, the order is comparable to the chancellor's decree on the sequence in which issues shall be tried in his own court.

All five counts of the franchisees' complaint clamor for extensive damages.[21] The first two, incorporating the antitrust claims, also pray that the Ply*Gem companies "be required to refund to the [franchisees] all profits and/or kickbacks and/or mark-ups of Ply*Gem and/or

[18] *E.g., Baltimore Contractors, Inc.* v. *Bodinger, supra* note 15, 348 U.S. at 184, 75 S.Ct. at 254, 99 L.Ed. at 240 ("[t]he reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action[;] [t]he incongruity of taking jurisdiction from a stay in a law-type and denying jurisdiction in an equity-type proceeding springs from the persistence of outmoded procedural differentiations"); *Houssain* v. *Bache & Co., Inc., supra* note 15, 183 U.S.App.D.C. at 343, 562 F.2d at 1291 ("[i]t is likely that *Baltimore Contractors* will not continue to cast its antiquated shadow of an equity-versus-law test upon modern interlocutory appellate practice").

[19] See 16 C. Wright & A. Miller, Federal Practice, § 3923, at 48-53 (1977).

[20] *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp., supra* note 15.

[21] The franchisees demand $3,000,000 in the antitrust counts and $8,000,000 in the three common law counts. App. 20, 34.

its affiliates in connection with the sale of merchandise, supplies, material and services to the" franchisees.[22] Additionally, the first four counts request "such other relief as shall be deemed just and proper."[23]

We thus are faced with a complaint seeking both equitable and legal relief, presenting what we have called "the most troublesome case[]"[24] in this area of federal appellate jurisdiction. Because piecemeal appeals are disfavored, we have embraced a presumption that the pending action is equitable, but that may be overborne if the request for equitable relief is incidental or clearly subordinate to essentially legal claims.[25] We believe that the franchisees' claims are basically legal.

The principal relief sought is an award of damages.[26] Although the call for return of profits, kickbacks and mark-ups arguably constitutes a plea for an accounting and restitution, we have held that an entreaty of this sort does not divest an action for damages of "its character as an action at law. . . ."[27] Moreover, recoupment of these items is asked in the antitrust counts, while the order appealed from is a refusal to stay proceedings on

[22] App. 20-21.

[23] App. 21-28.

[24] *Houssain* v. *Bache & Co., Inc., supra* note 15, 183 U.S. App. D.C. at 342, 562 F.2d at 1290.

[25] *Id.* See *Danford* v. *Schwabacher*, 488 F.2d 454, 457 (9th Cir. 1973); *cf. Schine* v. *Schine*, 367 F.2d 685, 688 (2d Cir. 1966) (Friendly, J., concurring).

[26] See note 21 *supra*.

[27] *Travel Consultants, Inc.* v. *Travel Management Corp., supra* note 15, 125 U.S.App.D.C. at 112, 367 F.2d at 338. See *Excavator Constr., Inc.* v. *Carpenters' Dist. Council*, 519 F.2d 814-815 (4th Cir. 1975); *Brannon* v. *Warn Bros., Inc.*, 508 F.2d 115, 118-119 (9th Cir. 1974).

the common law counts.[28] The franchisees also rely on the prayer of the first four counts for "such other relief as shall be deemed just and proper." [29] This boilerplate is simply a by-product of cautious pleading, however, and does not alter the fundamental nature of the litigation.[30]

In short, the historical analysis by which the appealability of orders granting or denying stays of judicial proceedings is to be determined indicates that the order appealed from is a contemporary analogue to the chancellor's refusal to enjoin an action at law. We therefore have jurisdiction.[31]

B. *The Denial of the Motion to Dismiss*

In general, of course, an order denying a motion to dismiss is not immediately appealable.[32] But, on appeal of an interlocutory order granting or denying an injunction, an appellate court may properly determine whether there is an "insuperable objection to maintaining the bill" and hence whether dismissal is required.[33] In *Deckert* v. *Independent Shares Corp.*,[34] the Supreme Court held that a federal court of appeals reviewing an interlocutory injunctive order has power to pass on the correctness of a denial of a motion to dismiss for want of jurisdiction and failure to state a cause of action. This principle applies with full force to the Ply*Gem companies' motion to dismiss for improper venue [35] and lack of personal jurisdiction.[36] Thus, the District Court's rejection of the companies' challenge to its venue and jurisdiction is properly before us.

[28] *Cf. Travel Consultants, Inc.* v. *Travel Management Corp.*, *supra* note 15, 125 U.S.App.D.C. at 111-112, 367 F.2d at 337-338 (taking jurisdiction of an interlocutory order insofar as it stayed a legal counterclaim pending arbitration but not insofar as it stayed an equitable claim).

[29] App. 21, 28.

[30] See *Travel Consultants, Inc.* v. *Travel Management Corp.*, *supra* note 15, 125 U.S.App.D.C. at 112, 367 F.2d at 338.

[31] Pursuant to 28 U.S.C. § 1292(a)(1) (1976).

[32] *Catlin* v. *United States*, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945); *English* v. *Cunningham*, 108 U.S.App.D.C. 358, 282 F.2d 841 (1960).

[33] *Deckert* v. *Independent Shares Corp.*, 311 U.S. 282, 287, 61 S.Ct. 229, 232, 85 L.Ed. 189, 193 (1940), quoting *Meccano, Ltd.* v. *Wanamaker*, 253 U.S. 136, 141, 40 S.Ct. 463, 465, 64 L.Ed. 822, 826 (1920). See *Aerojet-Gen. Corp.* v. *American Arbitration Ass'n*, 478 F.2d 248, 252-253 (9th Cir. 1973).

II. Venue and Personal Jurisdiction Under Section 12 of the Clayton Act

The Ply*Gem companies implore us to order dismissal of the antitrust claims for improper venue and ineffective service of process. With respect to each of these prerequisites to their action, the franchisees rely primarily [37] upon Section 12 of the Clayton Act, which provides:

[34] *Supra* note 33.

[35] See *Kodex Corp.* v. *Milgo Elec. Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860, 98 S.Ct. 185, 54 L.Ed.2d 133 (1977); *National Equip. Rental, Ltd.* v. *Fowler*, 287 F.2d 43, 45 (2d Cir. 1961); *Maryland* v. *Atlantic Aviation Corp.*, 361 F.2d 873, 874 (3d Cir.), *cert. denied*, 385 U.S. 931, 87 S.Ct. 290, 17 L.Ed.2d 212 (1966).

[36] *San Filippo* v. *United Bhd. of Carpenters & Joiners*, 525 F.2d 508, 510-513 (2d Cir. 1975); see 9 J. Moore, Federal Practice, ¶ 110.25[1] at 271 (2d ed. 1948).

[37] The complaint, ¶ 1, App. 4, also predicates venue upon § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), which reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district wherein it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.[38]

The companies moved to dismiss the suit on the grounds that venue was not properly laid in the District of Columbia and that personal jurisdiction was not obtained over them. The District Court denied the motion, holding that the "[d]efendants had a continuing relationship with some plaintiff corporations found in the District of Columbia," that "revenues were obtained from the District of Columbia in sufficient quantity," and that "it is not essential to venue that business must still be transacted as of the date of the filing of the complaint." [39] We concur with the District Court, though we find it necessary to expand somewhat upon its rationale.

Ply*Gem of Laurel authorized the franchisees to operate retail paneling stores exhibiting the Ply*Gem tradename and carrying products bearing the Ply*Gem trademark.[40] Ply*Gem of Laurel further convenanted to provide each franchisee with a guaranteed source of supply of Ply*Gem and other products and with training and guidance in the

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him sustained, and the cost of suit, including a reasonable attorney's fee.

We focus on the broader provisions of § 12, however, since the franchisees' strongest ground for asserting venue here seems to be that the companies transacted business in the District of Columbia.

[38] 15 U.S.C. § 22 (1976).

[39] *Lee* v. *Ply*Gem Indus., Inc.*, *supra* note 5, at 1, App. 207.

[40] Operators' Sub-License Agreement at 2-3, App. 36-37.

management of their outlets.[41] Each franchise was granted for a period of fifteen years, running well into the 1980s.[42] In return, each of the franchisees paid Ply*Gem of Laurel $10,000.[43] Effectiveness of each agreement was contingent upon approval by Ply*Gem Industries, the corporate parent of Ply*Gem of Laurel.[44]

The Ply*Gem companies launch their attack upon the propriety of suit in the District of Columbia from two facts: Ply*Gem of Laurel sold its last shipment of products to a plaintiff franchisee located in the District—Harbinger's, Inc.—in July, 1976, but the franchisees' action was not commenced until August 12, 1976.[45] The temporal reference of Section 12's "transact[ing] business" test, the companies argue, is the date suit is brought. Accordingly, they conclude, venue may not be laid in the District under Section 12 and extraterritorial service on them was not authorized thereby.

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[41] *Id.* at 3, App. 36.

[42] *Id.* at 1-2, App. 35-36.

[43] *Id.*

[44] *Id.* at 13, App. 47. In light of our construction of § 12, see notes 46-58 *infra* and accompanying text, we need not consider whether the award of franchise rights for a period commencing before but extending well beyond the date suit is filed, when made in exchange for a substantial fee, is itself the transaction of business after commencement of suit.

[45] Affidavit of Bernard Hewitt, *supra* note 1, at 3-4, App. 168-169. According to the affidavit, Ply*Gem of Laurel's sales to Harbinger's, Inc., amounted to $9,625 in 1975 and $3,867.63 in 1976. *Id.* at 4, App. 169. These were not isolated transactions, however, and "we think the volume of business was such here as to surmount any attack of a de minimis nature." *B. J. Semel Assocs., Inc.* v. *United Fireworks Mfg. Co.*, 122 U.S.App.D.C. 402, 407, 355 F.2d 827, 832 (1965); see *United States* v. *Scophony Corp.*, 333 U.S. 795, 807-808, 68 S.Ct. 855, 861-862, 92 L.Ed. 1091, 1100-1101 (1948).

We disavow the companies' hyperliteral interpretation of Section 12. To be sure, the section is cast in the present tense;[46] but Congress may have intended it to be read in the historical present tense.[47] The discernible decisional trend is to deem a judicial district an appropriate forum under Section 12 so long as the defendant transacted substantial business therein when the events giving rise to the putative antitrust violation occurred.[48] The policy and legislative history of Section 12, to which we now turn, persuade us to hew to that course.

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[46] See text *supra* at note 38.

[47] Compare 28 U.S.C. § 1391(c) (1976), which provides:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

The doing-business provision of this section has been interpreted as satisfied by a showing that the defendant corporation did business in the district at the time the cause of action accrued. *E.g., Snyder* v. *Eastern Auto Distrib., Inc.*, 357 F.2d 552, 556 (4th Cir.), *cert. denied*, 384 U.S. 987, 86 S.Ct. 1889, 16 L.Ed.2d 1004 (1966); *Farmers Elevator Mut. Ins. Co.* v. *Carl J. Austad & Sons, Inc.*, 343 F.2d 7, 12 (8th Cir. 1965).

[48] *Eastland Constr. Co.* v. *Keasbey & Mattison Co.*, 358 F.2d 777, 778-782 (9th Cir. 1966), *noted*, 65 Mich. L. Rev. 995 (1967); *Board of City Comm'rs* v. *Wilshire Oil Co.*, 523 F.2d 125, 131 (10th Cir. 1975). See also *Lamont* v. *Haig*, No. 75-2006 (D.C. Cir. Oct. 16 1978), at 16-17 n.49 (liberal interpretation of the "transact[ing] business" requirement of § 12 to denote the time when the cause of action arose accords with its legislative history). But *cf. Sunbury Wire Rope Mfg. Co.* v. *United States Steel Corp.*, 230 F.2d 511, 512 (3d Cir. 1950) (holding venue proper because of waiver, but noting that § 12 requires that the defendant be transacting business in the forum district at the time suit is filed).

General venue statutes are drafted to specify trial locations convenient for parties and witnesses.[49] Section 12, by contrast, is a special venue provision tailored for corporate antitrust defendants, whose convenience Congress was not particularly solicitous of.[50] Section 12, this court has said, "was intended by Congress to be an im-

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[49] For example, 28 U.S.C. § 1391(b) (1976) confers venue in nondiversity suits in the district "in which the claim arose." This portion of § 1391(b) was added by amendment in 1966, Act of Nov. 2, 1966, Pub. L. No. 89-714, § 1, 80 Stat. 1111, in order to "facilitate the disposition of . . . claims by providing, in appropriate cases, a more convenient forum to the litigants and witnesses involved." H.R. Rep. No. 1893, 89th Cong., 2d Sess. 2 (1966).

[50] In *United States* v. *National City Lines*, 334 U.S. 573, 68 S.Ct. 1169, 92 L.Ed. 1584 (1948), the Court held that the choice of forum afforded antitrust plaintiffs by § 12 could not be subverted by application of the doctrine of *forum non conveniens*. The Court explained:

> When . . . Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions, that body was not confronted with any problem of abuse by plaintiffs in selecting venue for antitrust suits; nor was it concerned with any question of providing means by which the defendants in such suit might defeat the plaintiff's choice to serve their own convenience. Congress' concern was quite the opposite. It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy. Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs or . . . to remove the 'often insuperable obstacle' thrown in their way by the existing venue restrictions.

Id. at 581, 68 S.Ct. at 1174, 92 L.Ed. at 1589-1590, quoting *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 374, 47 S.Ct. 400, 403, 71 L.Ed. 684, 689 (1927) (footnote omitted). See also 1 J. Moore, Federal Practice, ¶ 0.140[1.-1] at 1308-1309 (2d ed. 1948).

portant facet in the scheme of private remedies devised to promote the objectives of the antitrust laws." [51]

As introduced, the provision that was to become Section 12 simply reiterated the language of Section 7 of the Sherman Act, which specified that suits against a corporation could be brought only in the district where it was an "inhabitant" or could be "found." [52] This was unsatisfactory to the House, where Congressman Cullop summed up the sentiment: "I do not want to make a resident of California come to Trenton, N.J. to bring a suit for violation of this law, but I want him to sue at home in the jurisdiction where the cause of action arose." [53] Toward that end, the House amended the provision by adding "or has an agent." [54] The Senate Judiciary Committee rejected this amendment and changed the provision to its present form.[55] The final version attracted little attention until Congressman Webb, the manager of the bill in conference, explained just before approval of the Conference Report that "we have thrown the doors of the court wide open for the first time to every man who is injured. He can enter the court at his home and sue a man or corporation who injures him. . . ." [56]

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[51] *B. J. Semel Assocs., Inc.* v. *United Fireworks Mfg. Co.*, *supra* note 45, 122 U.S.App.D.C. at 405, 355 F.2d at 830 (footnote omitted).

[52] H.R. Rep. No. 627, 63d Cong., 2d Sess. 20 (1914).

[53] 51 Cong. Rec. 9416 (1914).

[54] *Id.* at 9466, 9607.

[55] S. Rep. No. 698, 63d Cong., 2d Sess. 73 (1914).

[56] 51 Cong. Rec. 16342 (1914). The House rejected an amendment to expand § 12 to permit venue "where the cause of action or any part thereof arises." 51 Cong. Rec. 9608 (1914) (remarks of Congressman Sumners). But this was probably because the "or has an agent" clause, see text at note 54 supra, and the later, yet more inclusive, "transacts

While this history does not specifically answer the question presented to us, we think we would dishonor the evident purpose of Congress should we rule that venue under Section 12 is improper as to a corporate defendant that transacts substantial business in a district, which assertedly gives rise to antitrust violations, but then departs prior to the institution of suit.[57] We thus conclude

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business" language were thought to cover these situations. *United States* v. *National City Lines*, supra note 49, 334 U.S. at 583, 68 S.Ct. at 1175, 92 L.Ed. at 1590-1591; *Eastland Constr. Co.* v. *Keasbey & Mattison Co.*, *supra* note 48, 358 F.2d at 781. See 51 Cong. Rec. 9608 (1914) (remarks of Representative Webb).

[57] Language in *United States* v. *Scophony Corp.*, *supra* note 45, 333 U.S. at 808, 68 S.Ct. at 862, 92 L.Ed. at 1101, supports the result we reach today:

> [Through § 12 Congress] relieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due.

Quoting *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, *supra* note 50, 273 U.S. at 374, 47 S.Ct. at 403, 71 L.Ed. at 689 (footnote omitted).

It has been suggested, Note, *Venue: Then or Now? Section 22 of the Sherman Act*, 115 U. Pa. L. Rev. 1007, 1009 (1967), that reliance on this language as authority for construing § 12 to encompass the transaction of business at the time the cause of action accrues is unwarranted for two reasons. First, the Court was discussing the extraterritorial service provision of § 12, not its venue provision. Second, the Court was concerned with a foreign corporation whose withdrawal might preclude suit altogether, as distinguished from an American corporation necessarily subject to suit in some district. While a close reading of *Scophony*, in light of the authorities therein cited, *e.g.*, *People's Tobacco Co.* v. *American Tobacco Co.*, 246

that at least in situations where the business activities relied on to establish Section 12 venue are bound up in the course of conduct alleged to transgress the antitrust laws, the temporal frame of reference of that section is the point at which the cause of action arises, not the date suit is commenced.[58]

The upshot of this is that venue as to Ply*Gem of Laurel is proper in the District of Columbia. And since this litigation must continue, we leave to the District Court the initial determination of whether the related corporate defendants, Ply*Gem Industries, Inc., and Ply*Gem Home Centers, Inc., have themselves transacted business in the District either independently or by controlling the operations of Ply*Gem of Laurel.[59] These mat-

U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587 (1918) cited in *United States* v. *Scophony*, *supra* note 45, 333 U.S. at 808-809 n.19, 68 S.Ct. at 862 n.19, 92 L.Ed. at 1101 n.19, indicates that the quoted passage was primarily concerned with service, the Court was construing the "transacts business" phrase of § 12, which governs venue as well as the permissibility of extra-territorial service. And there is no reason to suppose that § 12 was designed to reach foreign national corporations but not American corporations.

[58] The court in *In re Chicken Antitrust Litigation*, 407 F.Supp. 1285, 1293 (N.D. Ga. 1975), opined that when business transacted in the forum district is related to the alleged antitrust violations, the "time of accrual" construction of § 12 may be correct. On the other hand, the court held, where the business conducted in the forum district prior to commencement of suit bears no relation to the cause of action, such business cannot be relied upon to lay venue under § 12. We have no occasion to consider the validity of the latter thesis.

[59] On the control question, see *San Antonio Tel. Co., Inc.* v. *American Tel. & Tel. Co.*, 499 F.2d 349, 351-352 (5th Cir. 1974); *Tiger Trash* v. *Browning-Ferris Indus., Inc.*, 560 F.2d 818, 822-824 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978); *O.S.C. Corp.* v. *Toshiba Am., Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974).

[Continued]

ters are not sufficiently explicated by the franchisees' complaint or the companies' moving affidavit to permit a sound resolution of them on this appeal. In these circumstances, we think the franchisees should be afforded the opportunity to amend their complaint to state with more specificity just what business activities these defendants may have conducted in the District.[60]

III. Arbitration

We agree with the Ply*Gem companies, however, that the District Court erred in declining to stay proceedings on the common law counts of the franchisees' complaint pending arbitration. Each of the franchise contracts contains a provision specifying that "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration. . . ." [61] The enforceability of this stipulation is governed by the United States Arbitration Act,[62] under which an arbitration clause in a contract involving interstate commerce is made "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [63] The Act specifically requires a federal

[59] [Continued]

It may be that Ply*Gem Home Centers provided sufficient management services to franchisees located in the District to justify a finding that it independently transacted business therein. See generally, *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, *supra* note 50. On this matter, the franchisees' complaint is conclusory and the companies' affidavit unresponsive. Complaint ¶ 1, App. 4, Affidavit of Bernard Hewitt, *supra* note 1, at 2, App. 166.

[60] *Lamont* v. *Haig*, *supra* note 48, at 27.

[61] Operator's Sub-License Agreement ¶ 20, App. 47.

[62] 9 U.S.C. §§ 1-14 (1976).

[63] 9 U.S.C. § 2 (1976).

court in which suit is brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" to stay its hand while arbitration ensues.[64]

There is no dispute among the parties over the scope of the arbitration provision of the franchise agreements: the common law claims are covered, while the antitrust claims are not.[65] Yet the franchisees concur in the District Court's refusal to stay proceedings on the common law counts, arguing that the issues raised therein are intertwined legally and factually with those generated by the antitrust counts. Invoking the so-called permeation doctrine,[66] they reason that where it would be impracticable for an arbitrator to separate the antitrust questions from the arbitrable ones, the entire action should be tried by the court lest the important public policies served by judicial resolution of antitrust controversies be subverted.

The franchisees misread the permeation doctrine. Many of our sister circuits have held that where substantial antitrust claims are legally and factually inextricable from arbitrable contract claims, arbitration may be stayed pending the court's decision on the antitrust issues.[67]

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[64] 9 U.S.C. § 3 (1976).

[65] Brief for Appellants at 8-9; Brief for Appellees at 9-10.

[66] See cases cited *infra* note 67 and accompanying text.

[67] *American Safety Equip. Corp.* v. *J. P. McGuire & Co.*, 391 F.2d 821, 825-827 (2d Cir. 1968); *Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Applied Digital Tech., Inc.* v. *Continental Cas. Co.*, 576 F.2d 116, 117-119 (7th Cir. 1978); *Helfenbein* v. *International Indus., Inc.*, 438 F.2d 1068, 1070 (8th Cir. 1971); *Varo* v. *Comprehensive Designers, Inc.*, 504 F.2d 1103, 1104 (9th Cir. 1974); *Hunt* v. *Mobil Oil Corp.*, 410 F.Supp. 10, 25-26 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977); *cf. Sibley* v. *Tandy Corp.*, 543 F.2d 540, 542-544 (5th Cir. 1976), *rehearing denied*, 547 F.2d 286, 287 (5th Cir.), *cert. denied*, 434 U.S. 824, 98 S.Ct. 71, 54 L.Ed.2d 82 (1977).

This conclusion stems from two considerations. First, arbitral determinations are by statute accorded considerable deferance in court; judicial authority to tamper with an arbitration award is limited.[68] Second, antitrust claims should not be resolved by arbitration. For one thing, antitrust violations are public matters, and Congress probably did not intend "the national interest in a competitive economy" to be subject to private methods of dispute resolution.[69] For another, the complexity of antitrust issues makes them "far better suited to judicial than to arbitration procedures." [70] Additionally, it has been thought to be of "questionable propriety" [71] to entrust the decision of antitrust questions to commercial arbitrators when "it is the business community generally that is regulated by the antitrust laws." [72]

We perceive no present need to evaluate the soundness of the permeation doctrine. For even in the cases fashioning and applying that doctrine, arbitration proceedings were simply postponed pending definitive resolution of the antitrust issues in a federal court.[73] They provide no

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See also, Comment, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 Bost. C. Ind. & Comm. L. Rev. 406 (1969).

[68] *Wilko* v. *Swan*, 346 U.S. 427, 436, 74 S.Ct. 182, 187, 98 L.Ed. 168, 176 (1953). See 9 U.S.C. § 10 (1976).

[69] *Cobb* v. *Lewis*, *supra* note 67, 488 F.2d at 47, quoting *American Safety Equip. Corp.* v. *J. P. McGuire & Co.*, *supra* note 67, 391 F.2d at 826.

[70] *Cobb* v. *Lewis*, *supra* note 67, 488 F.2d at 47, quoting *American Safety Equip. Corp.* v. *J. P. McGuire & Co.*, *supra* note 67, 391 F.2d at 827.

[71] *Cobb* v. *Lewis*, *supra* note 67, 488 F.2d at 47.

[72] *Id.*, quoting *American Safety Equip. Corp.* v. *J. P. McGuire & Co.*, *supra* note 67, 391 F.2d at 827.

[73] See cases cited *supra* note 67.

authority for the ruling that the franchisees seek: that arbitrable claims become subject to adjudication in court merely because they are related to non-arbitrable claims. Protection of the policy interest furthered by judicial resolution of antitrust disputes does not require judicial proceedings so inclusive, given the court's capacity to stay arbitration proceedings when necessary or desirable.[74]

The District Court's refusal to stay litigation of the claims arising out of the franchise contracts pending arbitration deprived the Ply*Gem companies of the benefit of their bargain and ran counter to the Arbitration Act, which clearly expresses a mandate for judicial recognition of commercial arbitration agreements.[75] It must, then, be reversed.

The District Court's order denying the Ply*Gem companies' motion to dismiss the antitrust counts for want of

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[74] This appeal does not present the question whether in the instant case arbitration proceedings should be stayed pending judicial determination of the antitrust claims. See, *e.g.*, *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710, 716 (9th Cir. 1974).

[75] See generally, *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

The District Court's order refusing to stay proceedings on the common law counts also rested on the belief that arbitration had already been unsuccessfully attemtped. *Lee* v. *Ply*Gem Indus., Inc.*, *supra* note 5, at 1, App. 207. The record reveals, however, that while the franchisees initially pressed for arbitration as provided by the contracts, they voluntarily withdrew their request before arbitration proceedings commenced. App. 183. We are at a loss to perceive why the franchisees' retraction of their demand for arbitration should preclude the Ply*Gem companies from relying on the agreement to arbitrate instead of litigate disputes arising out of the sublicense contracts.

personal jurisdiction and for improper venue is affirmed as to defendant Ply*Gem of Laurel. Its order refusing to stay proceedings on the common law counts of the franchisees' complaint pending arbitration is reversed. The case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1492

JOHN M. LEE, *et al.*,

Plaintiffs,

v.

PLY*GEM INDUSTRIES, INC., *et al.*,

Defendants.

After considering the briefs and affidavits, oral argument, and the entire record herein, the Court has resolved the pending pretrial motions as indicated below.

IT IS ORDERED:

(1) Defendants' motion to dismiss for lack of personal jurisdiction and for improper venue is denied. Defendants had a continuing relationship with some plaintiff corporations found in the District of Columbia, revenues were obtained from the District of Columbia in sufficient quantity, and it is not essential to venue that business must still be transacted as of the date of filing of the complaint. *Board*

of County Commissioners v. *Wilshire Oil Co. of Texas,* 523 F.2d 125, 131 (10th Cir. 1975).

(2) Defendants' motion to transfer to the United States District Court for the Southern District of New York is denied. Plaintiffs' choice of venue must be respected absent persuasive factors not here demonstrated.

(3) Defendants' motion to stay proceedings pending arbitration is denied. Arbitration will not resolve the basic antitrust claims and the parties have already attempted arbitration without success.

(4) Defendants' motion to compel plaintiffs to serve an amended complaint separately stating their claims is granted. Plaintiffs shall, within two weeks, file an amended complaint to accomplish this, to correct certain gross misstatements in the complaint and to eliminate surplusage. Defendants shall answer within two weeks of service of the amended complaint on defendants' counsel.

(5) Plaintiffs' motion to strike the affidavit of Bernard Hewitt is denied.

(6) Defendants' motion for a protective order with respect to answering certain interrogatories is granted.

(7) A status conference is set for 9:30 a.m. on January 21, 1977, in Courtroom No. 6, to establish a discovery schedule and to resolve any further motions directed to the amended complaint as may be filed. Neither side shall conduct any discovery prior to the status conference without prior permission of the Court.

GERHARD A. GESELL
United States District Judge

November 29, 1976.